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No. 91-1431

In The

Supreme Court of the United States

October Term, 1991

ROMA JEAN BARGER, RICHARD O. BARGER, JR., KEVIN S. BARGER and JOHN B. BARGER,

Petitioners,

vs.

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and GANNETT CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Courier-Journal and Louisville Times Company and Gannett Co., Inc., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the Kentucky Court of Appeals entered on April 12, 1991.

STATEMENT OF THE CASE

Richard Owen Barger was shot and killed at the Standard Gravure plant in Louisville, Kentucky on September 14, 1989. The same mentally disturbed gunman who shot Mr. Barger killed eight other individuals and himself, and injured twelve others, in the Standard Gravure rampage. The shootings, and particularly the assailant's use of an assault rifle, the importation and sale of which has been extremely controversial, created enormous public interest in Louisville and throughout the world.

The day after the shootings, Courier-Journal and Louisville Times Company ("Courier-Journal") published the photograph at issue in this action in its daily newspaper, *The Courier Journal,* as part of its extensive account of the tragedy. The newspaper account noted the location of at least four people's wounds ("shot in the legs"; "shot in the head"; "shot in the chest"; "shot in the back"), and stated that "the pressroom was awash with blood" after the shootings. The photograph at issue in this action showed Mr. Barger's body and the room in which he was killed. The caption which accompanied the photograph did not identify Mr. Barger. The photograph was subsequently released for publication by other media outlets in connection with their articles about the shootings, a practice which is common in the industry.

On September 21, 1989, one week after the shootings, Mr. Barger's widow and three sons (the "Bargers") filed their complaint against Courier-Journal and its parent corporation, Gannett Co., Inc. ("Gannett"), based on the publication of the photograph.[1] The complaint alleged state law claims of an invasion

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1. Gannett is not liable to the Bargers for the same reasons that the Kentucky Court of Appeals found that Courier-Journal was not liable. Even if Courier-Journal were liable, Gannett's ownership and control of Courier-Journal would

(Cont'd)

of the Bargers' rights to privacy and intentional infliction of emotional distress. The complaint did not, and could not, deny that the photograph was an accurate depiction of the scene of Mr. Barger's death.

Courier-Journal and Gannett moved to dismiss the complaint and filed a brief which cited numerous similar cases which had been dismissed. The Bargers filed a response, but cited *no case* in which liability had been imposed for the publication of a photograph which accurately depicted a newsworthy event, like the one at issue here.[2] Because the complaint failed to state a claim upon which relief could be granted against either Courier-Journal or Gannett, the trial court dismissed the complaint.

On April 12, 1991, the Kentucky Court of Appeals affirmed the trial court's order, in an opinion which rested entirely on state law precedents. The Court of Appeals held that publication of the photograph did not constitute the outrageous conduct necessary to support a claim for intentional infliction of emotional distress in Kentucky. In so holding, the Court of Appeals merely applied the Kentucky Supreme Court's holding in *Humana of Kentucky, Inc. v. Seitz,* 796 S.W. 2d 1 (Ky. 1990), a case involving the

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(Cont'd)
not be sufficient to impose liability on Gannett, pursuant to Kentucky law. *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), citing *Kentucky Auto Mechanics Service Co. v. Kentucky Auto Parts Co.*, 267 Ky. 531, 102 S.W. 2d 1022 (1937).

2. The Bargers' petition to this Court also cites no such case, and adds more heat than light to this dispute. The Bargers' contentions that Courier-Journal Editor David Hawpe was "sarcastic and less than cordial" to Mrs. Barger and that Hawpe stated "Courier-Journal would print whatever they chose to print and there was nothing the Bargers could do about it" (Petition at 3) are false, and irrelevant to the issues in this action.

treatment of a hospital patient, which raises no federal or constitutional issues. The Court of Appeals' only mention of the First Amendment to the United States Constitution was in a footnote, which recognized that a contrary decision under state law, imposing liability on Courier-Journal on these facts, "would create serious questions regarding a possible violation of the Courier's first amendment rights" (Opinion at 5 n.1).

In rejecting the Bargers' claim for invasion of privacy, the Court of Appeals held that the Bargers lacked standing to maintain the action, because *their* privacy was not invaded by the publication of the photograph of their husband and father. That decision was grounded solely in state law. The court separately held that, even if the Bargers had standing to maintain the action, no invasion of privacy could be established because "the Courier clearly was authorized to publish the offending photograph on the ground that it involved a matter of legitimate public concern" (Opinion at 9). The latter holding was again based on state law, and no federal issues were even discussed.

The Bargers moved the Supreme Court of Kentucky to grant discretionary review. The Supreme Court denied the motion on November 14, 1991.

The Bargers now seek to have this Court review the decision of the Kentucky Court of Appeals, despite the fact that it rested on state grounds and no federal question is presented.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS JUDGMENT RESTED ON STATE LAW GROUNDS AND THIS COURT LACKS JURISDICTION TO REVIEW IT.

This Court has jurisdiction to consider this case only if the judgment of the Kentucky Court of Appeals was based on federal law. *Michigan v. Long,* 463 U.S. 1032 (1983). Even where a state court mentions both federal and state grounds for its decision, this Court will not review the judgment "if the same judgment would be rendered by the state court after [this Court] corrected its views of federal law," because "such a review could amount to nothing more than an advisory opinion." *Id.* at 1042, quoting *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945).

In this case, there is no indication that the Kentucky Court of Appeals based any of its decisions on federal law. In holding that the Bargers failed to state a claim for relief for the tort of outrageous conduct, the court relied on one state court decision, *Humana of Kentucky, Inc. v. Seitz,* 796 S.W. 2d 1 (Ky. 1990). That decision, which held that Kentucky would not recognize an outrage claim unless the alleged conduct was "beyond all decency" involved the treatment of a hospital patient and presented no constitutional questions.

The Court of Appeals' only reference to the First Amendment to the United States Constitution was in a footnote placed after the analysis which rejected the Bargers' claim on state law grounds. The court said: "A contrary conclusion, we note, would raise serious questions regarding a possible violation of the Courier's first amendment rights. *See Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)". The mere mention

of the possible application of federal law, if a contrary conclusion had been reached on the state law issues, is inadequate to invoke the jurisdiction of this Court, because the decision clearly rested on state, rather than federal, law.

The judgment rejecting the Bargers' invasion of privacy claim also rests on state law principles. The Court of Appeals held that the Bargers lacked standing to bring the action, citing *Restatement (Second) of Torts* § 652I (1976). The court expressly recognized that the Bargers' complaint was properly dismissed "based solely on the standing issue" (Opinion at 7).

An alternative holding — that the privacy claim fails because the photograph involved a matter of legitimate public concern — was made only because of "the likelihood that the issues involved in the instant action will arise again in the future . . ." (Opinion at 7). The court held that the *Restatement*, as adopted by the Kentucky Supreme Court as a matter of state law, barred the Bargers' privacy claim. Of course, even if what the court called the "newsworthiness" defense to privacy claims were grounded in the First Amendment, which is not the case, the fact that the Bargers lack standing to bring a privacy claim in these circumstances would constitute independent and adequate state grounds for the decision, barring this Court's intervention.

The Bargers have virtually conceded that the state court relied on state law in affirming the dismissal of their complaint, noting that "the Court's failure to address the constitutional issue presented to it" is "of interest" (Petition at 7). In fact, the court's failure to address or rely on any federal grounds is dispositive, and the Bargers' petition should be denied for that reason alone.[3]

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3. Because the Bargers have argued that the Kentucky court was wrong in its application of state law, Courier-Journal feels compelled to respond. The (Cont'd)

II.

THE BARGERS' CLAIM FOR INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS WAS PROPERLY DISMISSED.

The Kentucky Supreme Court first recognized the tort of intentional or reckless infliction of emotional distress, also known as the tort of outrage, in *Craft v. Rice*, 671 S.W. 2d 247 (Ky. 1984). *Craft* expressly adopted *Restatement (Second) of Torts* § 46 (1965):

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement § 46. In 1990, the court reiterated the threshold requirements for the tort, holding that conduct by hospital personnel which the court characterized as "cold, callous, and lacking sensitivity" failed to meet the standards for an outrage claim, and that the trial court had properly granted summary judgment for the hospital company. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W. 2d 1, 1 (Ky. 1990).

The court emphasized comment d of § 46 of the *Restatement*:

> It has not been enough that the defendant has acted

(Cont'd)
following discussion demonstrates that the Kentucky Court of Appeals was correct in affirming the dismissal of the Bargers' complaint as a matter of state law.

> with an intent which is tortious . . ., or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," . . . . *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*

Humana, supra, 796 S.W. 2d at 3, quoting *Restatement* § 46, comment d (emphasis added by court). The court noted that even evidence which shows "a lack of compassion and lack of taste" is insufficient to meet the threshold requirement for the tort of outrageous conduct or intentional infliction of emotional distress in Kentucky. *Id.*, 796 S.W. 2d at 4.

The *Humana* decision reaffirmed that *courts* must make the initial determination whether the conduct complained of satisfies "the threshold requirements of the tort of outrageous conduct, so as to justify submitting the case to a jury". *Humana, supra,* 796 S.W. 2d at 1. That holding is in accord with the *Restatement,* which provides that "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so." *Restatement* § 46, comment h.

Because the actions about which the Bargers complained failed to meet the standard set forth in the *Restatement* and the Kentucky Supreme Court's opinions, the trial court properly dismissed the Bargers' complaint, as the Court of Appeals found. After reviewing the facts of this case, the Court of Appeals held that, even if Courier-Journal's actions in publishing the photograph showed a "lack of compassion and lack of taste," the conduct clearly was not "beyond all decency" (Opinion at 3-5). Therefore,

the Courier-Journal's actions are not actionable in Kentucky under the tort of outrage. The Court of Appeals merely applied well settled state law, and there are no "special and important reasons" for this Court to review the decision. Sup. Ct. R. 10.1.

In a footnote, the Court of Appeals noted, but did not rely on, the serious constitutional problems which would result from imposing liability on a newspaper on these facts. This Court has recognized that imposing liability for news publications because they are deemed outrageous would seriously implicate rights guaranteed by the First Amendment to the United States Constitution.

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 882 (1988).

Other courts have also recognized that the imposition of liability for news publications deemed to be "offensive or outrageous" would expose necessarily subjective news judgments to risk, and impede the flow of important information to the public. As the Massachusetts Supreme Judicial Court stated in a case involving a photograph of an accident victim:

> A newspaper account or a radio broadcast setting

> forth in detail the harrowing circumstances of the accident might well be as distressing to the members of the victim's family as a photograph of the sort described in the declaration. A newspaper could not safely publish the picture of a train wreck or of an airplane crash if any of the bodies of the victims were recognizable. The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable.

Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E. 2d 286, 287 (1951).

As *Kelley* states and the trial court and Kentucky Court of Appeals recognized, if the claims asserted by the Bargers had merit, the media would always be at risk in reporting on any news event resulting in death or physical injury. If the spouses and children of those killed in Vietnam had a cause of action for the "outrageous" publication of photographs of the battle scenes in which their relatives were killed, the public's knowledge about that war would have been severely limited. Are the Bargers seriously contending that photographs of casualties of war and victims of natural disasters like earthquakes may not be published for fear the publication will "offend" and "outrage" the majority of readers? The tort of intentional infliction of emotional distress simply cannot be extended to accurate news publications on matters of public concern.

Courier-Journal's decision to publish the photograph at issue here and to release the photograph for use in other news publications fails the test of an action "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable

in a civilized community." *Humana, supra*, 769 S.W. 2d at 3. The trial court was therefore correct in dismissing the Bargers' complaint, and the Court of Appeals was correct in affirming that decision, as a matter of state law. No special and important reasons justify further judicial review in this action.

III.

THE BARGERS' CLAIM FOR INVASION OF PRIVACY WAS PROPERLY DISMISSED.

A claim for invasion of privacy in Kentucky is governed by "the principles of that tort as enunciated in the *Restatement (Second) of Torts* (1976)." *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W. 2d 882, 887 (Ky. 1981), *cert. denied,* 456 U.S. 975 (1982). The Bargers' privacy claim fails because the privacy rights of the Bargers were clearly not invaded by the publication of a photograph of Mr. Barger's body, and because the matter depicted in the photograph, the shooting of Mr. Barger in a rampage in which twenty other people were killed or injured, was of legitimate concern to the public. The Kentucky Court of Appeals holdings on both points simply applied well settled state law, as expressed in numerous cases.

A. Because Only A Living Individual Whose Privacy Is Invaded May Maintain An Action For Invasion Of Privacy, The Bargers' Claim Fails.

Under the *Restatement,* which the Kentucky Supreme Court has adopted as the law of privacy in Kentucky, it is black letter law that only a living individual whose privacy is invaded may maintain an action for invasion of privacy.

> Except for the appropriation of one's name or likeness, an action for invasion of privacy can be

> maintained only by a living individual whose privacy is invaded.

Restatement (Second) of Torts § 652I. As the comment to the *Restatement* expressly states, the cause of action "cannot be maintained by other persons such as members of the individual's family, unless their privacy is invaded along with his." *Restatement* § 652I, comment a. It is uncontested that the photograph at issue in this action does not include *any* of the Bargers — the petitioners in this action. Their claim that the photograph of Mr. Barger's body (unidentified) somehow invades *their* privacy was therefore properly dismissed.

Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E. 2d 286 (1951), is squarely on point. The plaintiffs in *Kelley* were the parents of a 15-year old girl killed in an automobile accident. Their complaint alleged that a photograph of the girl's body depicted their daughter in a "deformed and hideous manner." *Id.*, 98 N.E. 2d at 287. The plaintiffs in *Kelley*, like the Bargers, did not allege "that any likeness of the plaintiffs or either of them was published." *Id.*, 98 N.E.2d at 287. The court dismissed the complaint, noting that relatives of the person depicted in a photograph simply may not bring an action under these circumstances:

> [I]f the right asserted here were sustained, it would be difficult to fix its boundaries . . . . [I]f the parents had a cause of action in a case like the present there would seem to be no reason why other members of the immediate family, the brothers and sisters, whose sensibilities may also have been wounded should not also be permitted to sue. The only reference to the plaintiffs was that the girl whose body appeared in the photograph was their

> daughter. This can hardly be said to interfere with their privacy.

Id., 98 N.E. 2d at 287-288.

As the Court of Appeals correctly noted, the Bargers "failed to address this defense in their reply brief" to the Court of Appeals and "have cited no authorities which support their right to maintain an action for invasion of privacy in the circumstances presented here" (Opinion at 7). The Bargers have also failed to address the issue in their petition to this Court. The Bargers simply have no standing to maintain an action for invasion of privacy based on the publication of a photograph of Mr. Barger's body. The Court of Appeals applied well settled state law in holding that the Bargers' privacy claim was properly dismissed, and there are no "special and important reasons" to review its decision.

B. Because The Matter Publicized Was Of Legitimate Concern To The Public, The Bargers' Claim Fails.

In their petition to this Court, the Bargers have spent most of their time discussing an independent ground for the dismissal of their privacy claim. In order to succeed in a claim for invasion of privacy based on allegedly unreasonable publicity given to one's private life, a plaintiff must plead and prove two elements, including that the "matter publicized . . . is not of legitimate concern to the public."

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, *if the matter publicized* is of a kind that
>
> (a) would be highly offensive to a reasonable person, and

(b) *is not of legitimate concern to the public.*

Restatement § 652D (emphasis added). In this action, the Bargers did not allege, and certainly could not prove, that the matter publicized, the tragedy at Standard Gravure, "is not of legitimate concern to the public". On the contrary, a rampage in which a mentally disturbed person wielding an assault rifle kills eight of his fellow workers and himself, and injures twelve others, is of substantial, and very legitimate, public concern. Therefore, the Bargers' claim for invasion of privacy fails, as the Court of Appeals correctly found.

Comment g to *Restatement* § 652D offers guidance into the scope of "legitimate public concern", and specifically mentions "homicides and other crimes":

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." . . . . Authorized publicity includes publications concerning homicides and other crimes . . . and many other similar matters of genuine, even if more or less deplorable, popular appeal.

Restatement § 652D, comment g. As the Court of Appeals noted, comment f to that section expressly states that "*the victims of crime" are legitimate subjects of public interest*, and notes that "publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and *victims*, and those who are closely associated with them." *Restatement* § 652D, comment f (emphasis added).

The applicability of the public interest limitation on the right of privacy is a question of law, for the court, not a jury (or those writing letters to the editor), to decide.

> The dispositive issue is the question of the public interest limitation on the right of privacy. This is a question of law to be determined by the court . . . . Disposition of right of privacy actions on motion to dismiss or for summary judgment is a frequent occurrence.

Buzinski v. DoAll Company, 31 Ill. App. 2d 191, 175 N.E. 2d 577, 580 (1961) (citations omitted). As a Florida Supreme Court decision has noted, "the requirement of lack of public concern is a formidable obstacle":

> The developing law surrounding the private-facts tort recognizes that the requirement of lack of public concern is a formidable obstacle. In fact, the "newsworthiness" defense has been recognized by commentators as being so broad as to nearly swallow the tort. *See, e.g.*, Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983).

Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374, 1377 (Fla. 1989). The decisions of numerous other courts support the view that news articles and photographs concerning the victims of homicides and other crimes, and tragedies of all sorts, simply are not actionable invasions of privacy. In fact, Kentucky's highest court reached the same conclusion in a 1929 decision.

The plaintiff in *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929), was walking along a Louisville street with her husband when he was assaulted by two men and stabbed to death. The widow sued the newspaper, which published a story about the incident and photographs of the plaintiff and her

husband. The complaint was dismissed and the Court of Appeals affirmed:

> The right of privacy may be defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity . . . . In short, it is the right to be let alone. There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence . . . . [Plaintiff] was an innocent actor in a great tragedy in which the public had a deep concern . . . . On the whole, we conclude that the publication of the photograph . . . was not an invasion of her right of privacy.

Id., 18 S.W. 2d at 973. In this case, as in *Jones,* Mr. Barger became "an innocent actor in a great tragedy in which the public had a deep concern." *Id.* The Bargers' claim, like the complaint in *Jones,* was therefore properly dismissed.

The rule laid down by the Kentucky Court of Appeals in the *Jones* case in 1929 was affirmed by the Kentucky Supreme Court in 1982. In *McCall, supra*, the court clearly stated that the right of privacy does not extend to matters of public concern:

> The right of privacy does not prohibit: (1) any publication of a matter which is of public or general interest.

McCall, supra, 623 S.W. 2d at 887. *See also, Pearce v. Courier-Journal and Louisville Times Company*, 683 S.W. 2d 633, 637

(Ky. App. 1985) and *Bell v. Courier-Journal and Louisville Times Company*, 402 S.W. 2d 84, 88 (Ky. 1966).

Courts in other jurisdictions have also rejected invasion of privacy claims very similar to the one brought by the Bargers. *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E. 2d 344 (1956), involved a newspaper's publication and distribution of photographs of the victim of a gruesome killing. Unlike the instant action, the photographs at issue in *Waters* were "taken at close range" and "showed the decomposition of part of the child's body, and showed it wrapped in chains." 91 S.E. 2d at 345. Nevertheless, the Georgia Supreme Court held that the mother of the victim could not maintain an action for the invasion of the mother's right of privacy:

> The extracts from the above cases illustrate the tendency of courts of other jurisdictions to hold that, where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy. We concur in this view. There are many instances of grief and human suffering which the law can not redress. The present case is one of those instances. Through no fault of the petitioner or her deceased child, they became the objects of widespread public interest . . . . [T]he dissemination of information pertaining thereto would not amount to a violation of the petitioner's right of privacy.

Id., 91 S.E. 2d at 348. The court also noted that the same rule barred the mother's complaint based on the sale of copies of the same photographs which appeared in the newspaper. *Id.* The latter holding is directly applicable to the Bargers' complaint about

Courier-Journal's routine release to other publications of the photograph at issue here.

The Supreme Court of Iowa has also rejected a privacy claim based on a newspaper's publication of photographs of the mutilated and decomposed body of a murder victim. *Bremmer v. Journal-Tribune Publishing Company*, 247 Iowa 817, 76 N.W. 2d 762 (1956). The court found as a matter of law that the discovery of the body of a missing boy was "of proper public interest" and specifically rejected a contention that the public had no legitimate interest in a photograph showing "the appearance of the body", the same contention on which the Bargers now rely:

> Plaintiffs state: "While it may be true that the public was interested in the fact that the missing Bremmer boy was found and whether or not he was dead or alive, the public had no legitimate interest or concern in the condition of the body." That conclusion is without support. *From a news standpoint the public is interested in the appearance of the body of such a local victim. Such appearance may be pictured by words or by photographs or both.*

Id. at 768 (emphasis added). The court also noted that "the courts are not concerned with canons of good taste, and pictures which startle, shock, and even horrify may be freely published . . . if the occasion is such that his right of privacy does not protect him from the publication." *Id.*[4]

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4. Unable to find *any* decision which supports their case, the Bargers cite the *dissent* in *Bremmer*, ignoring the majority holding. *See* Petition at 13.

Relying on *Restatement* § 652D, numerous courts have dismissed complaints based on the publication of news articles and photographs. An example is *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982), *petition denied*, 431 So. 2d 988 (Fla.), *cert. denied*, 464 U.S. 893 (1983), which involved a newspaper's publication of a photograph of a hostage victim, clad only in a dish towel, after she was rescued by police. A Florida appellate court reversed a judgment for the plaintiff, stating that "[c]ourts should be reluctant to interfere with a newspaper's privilege to publish news in the public interest." *Id.* at 428. The court also stated:

> Although publication of the photograph, which won industry awards, could be considered by some to be in bad taste, the law in Florida seems settled that where one becomes an actor in an occurrence of public interest, it is not an invasion of her right of privacy to publish her photograph with an account of such occurrence.

Id., 432 So. 2d at 427 (footnotes omitted).

There can be no doubt that the news reports about the rampage at Standard Gravure were of legitimate public concern. Indeed, the Bargers do not complain about the thousands and thousands of words and descriptions written and published about this news event, including the words about the conditions of the bodies of the shooting victims (Petition at 14). Rather, they seek to assert a claim based on the explicit nature of one photograph. This is nothing more than a claim based on "good taste," a claim which the courts have time and again refused to accept.

Apparently recognizing the weakness of their claims, the Bargers have contended on appeal that the photograph was taken "through a blatant trespass," and that the manner in which the

photograph was taken supports their claims. The alleged trespass was not mentioned in the complaint. The Kentucky Court of Appeals properly rejected the Bargers' belated attempt to convert their case to a trespass action, for several reasons.

As the Court of Appeals recognized, only the owner or possessor of property may maintain an action for trespass on it. *Marinaro v. Deskins,* 344 S.W. 2d 817, 819 (Ky. 1961). Only Standard Gravure, which owns and possesses the property where the photograph was taken, would have standing to maintain a trespass action, and neither it nor any public authority has filed any action regarding the photographer's presence at the crime scene.[5]

Moreover, even if the Bargers had pled their trespass claim and could maintain a trespass action, neither of which is the case, this Court has held that no trespass occurs when under the "habits of the country" entry is commonly made under the circumstances presented. *McKee v. Gratz,* 260 U.S. 127, 136 (1922). As the Kentucky Court of Appeals noted, entry of media personnel into crime scenes is a commonly accepted practice. In dismissing a claim by the mother of an accident victim concerning a photograph of the "silhouette" left on the floor after the removal of the victim's body, the Supreme Court of Florida stated:

> [I]t has been a long-standing custom and practice throughout the country for representatives of the news media to enter upon private property where

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5. *Le Mistral, Inc. v. Columbia Broadcasting System,* 61 App. Div. 2d 491, 402 N.Y.S. 2d 815 (1st Dept. 1978), upon which the Bargers rely, is a trespass case brought by a restaurant owner for trespass in the restaurant by a television reporter and camera crew. This case is easily distinguished from *Le Mistral.* It is not a trespass action and it is not brought by the owner of the Standard Gravure property.

> disaster of great public interest has occurred — entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity.

Florida Publishing Company v. Fletcher, 340 So. 2d 914, 918 (Fla. 1976), *cert. denied,* 431 U.S. 930 (1977).

In this case, the photograph was taken in a building adjoining Courier-Journal's offices, which is connected to those offices by a series of hallways and tunnels, and no one directed the photographer not to enter the premises, or told him to leave, before the photograph was taken. As the Court of Appeals correctly held, "the Courier cannot be denied its defense of newsworthiness on the ground that its photographer committed a trespass in order to obtain the victim's photograph" (Opinion at 10). There are no "special and important reasons" to review the Court of Appeals decision, and the Bargers' petition should be denied.

CONCLUSION

The Bargers suffered a tragic loss in the death of their husband and father. Courier-Journal and Gannett regret any distress which news coverage of their loss may have caused them. Nevertheless, the photograph at issue simply is not actionable, as numerous similar cases have held. The trial court and Kentucky Court of Appeals merely applied those cases, and the holdings of the Kentucky Supreme Court, in rejecting the Bargers' claims on state law grounds. This Court therefore lacks jurisdiction to review the judgment. Even if this Court had jurisdiction, there are no "special and important reasons" to review the Court of Appeals decision. Indeed, *every* similar case is in accord with the decision. Therefore, Courier-Journal and Gannett ask this Court to deny the Bargers' petition for writ of certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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